No. 2030

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

THE MONTANA-TONOPAH MINING COMPANY (a corporation),
Plaintiff in Error,

vs.

R. P. DUNLAP,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the District of Nevada.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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FRANK D. MONCKTON, Clerk.

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Statement of the Case.

The defendant in error, as plaintiff in the Court below, on the 26th day of February, 1910, brought this action against the plaintiff in error, as defendant, in the Fifth Judicial District of the State of Nevada in and for the County of Nye. The case was thereafter duly removed to the Circuit Court of

United States, Ninth Circuit, District of Nevada, on the grounds of diversity of citizenship, the defendant being a Utah corporation and the plaintiff a citizen and resident of the State of Nevada.

In this brief the parties will be referred to as to the respective positions occupied by them in the Court below.

The plaintiff brought suit against the defendant on a quantum meruit to recover for the value of services rendered by him to the defendant from January, 1903, to February 15, 1910, at the instance and request of the defendant, alleging that defendant agreed to pay therefor whenever it was out of debt and that defendant was out of debt on February 15, 1910, and that the reasonable value of the services so rendered was Twenty-four Thousand Nine Hundred ($24,900) Dollars, that Four Thousand Four Hundred ($4,400) Dollars had been paid, and this action was brought to recover the balance of Twenty Thousand Five Hundred ($20,500) Dollars (Tr. 1-2).

The defendant, by its answer, denies that the plaintiff rendered any services whatsoever to it, excepting such services as were incidental to the offices of Secretary and Treasurer of the defendant, which offices were held by the plaintiff from February 15, 1903, at a salary of One Hundred and Fifty ($150) Dollars per month up to and including October 15, 1903, and thereafter at a salary of Two Hundred ($200) Dollars per month up to and including Feb-

ruary 21, 1905, at which time the resignation of the plaintiff was accepted by the defendant company, all of which salary was paid to the plaintiff, and the defendant further alleges in its amended answer that the plaintiff was on or about September 8, 1903, elected a Director of the Company, and was on or about September 12, 1905, elected a Vice-President of the company, both of which offices he continued to occupy until the date of his resignation from the Board of Directors of the company on February 15, 1910, a few days prior to the bringing of this action, and that the plaintiff has performed no services for or on behalf of the defendant corporation, excepting those incidental to the offices of secretary and treasurer of the company, for which he has been fully paid and compensated, and excepting those incidental and properly belonging to the offices of Director and Vice-President of said company usually, duly and legally performed by such officers without compensation, and that there is nothing due or owing from said defendant to said plaintiff (Tr. 6-9).

On February 20, 1910, at the time of the trial the defendant filed a further amended answer, identical with its previous amended answer, excepting that in the last amended answer defendant set up the statute of limitations against any claim of the plaintiff for services rendered to the defendant prior to a date four (4) years before the beginning of this action (Tr. 10-13).

Upon the issues joined by these pleadings and substantially as set forth in this statement the case was tried before a jury, and the following facts were in brief disclosed:

Statement of Facts.

The defendant corporation was organized under the laws of Utah some time in 1902, at which time one Charles E. Knox became its President and continued in such office up to the date of the trial of the case on March 12, 1911 (Tr. 246). The corporation owned certain mining property and maintained its offices in Tonopah, Nevada, but adopted no by-laws until September, 1907 (Tr. 248).

Some time in the latter part of the year 1902, Mr. Knox met the plaintiff Dunlap in Kansas City and the latter wanting to know if there was an opening in the West, Mr. Knox suggested that there was and that Dunlap return to Tonopah with him. Dunlap looked the situation over after arriving in Tonopah and expressed a desire to become connected with the Montana-Tonopah Company, and in January, 1903, became its Secretary and Treasurer and the books of the Company were turned over to him by Mr. Morris, who had been acting as the Secretary previously. His salary was at this time fixed at $150 a month (Tr. 19). At this time there were no by-laws of the company designating the character of services to be rendered by such Secretary-Treas-

urer and no special agreement was made as to the work to be done by Mr. Dunlap, who proceeded to perform the duties incident to those offices and continued to do so for the designated salary up to October 3, 1903, when his salary was raised to $200 (Tr. 26). He continued to fill such consolidated office until February 15, 1905, when his resignation from such office was accepted. Just prior to his resignation he made an application to the Board of Directors for an increase in his salary to $300 per month, and such increase being denied, tendered his resignation (Tr. 27-252). At this time a resolution was passed by the Board of Directors expressing appreciation and gratitude for the manner in which he had performed his "duties" and expressing approval that he was still to remain a director so that they might benefit by his "wise counsel" (Tr. 28-30). Dunlap at this time made no claim for special services theretofore rendered and for which he was asking compensation at the time of the trial. These special services were testified to in a vague and desultory manner, as consisting of attention to all outside business matters pertaining to the management of the company, but narrowed down, those alleged special services rendered from January, 1903, to February 15, 1905, when he resigned his office as Secretary-Treasurer, resolved themselves into three different items, viz.:

(1) Some attention given to checking up the patent surveys in the Surveyor General's office at

Reno on application for patent some mining ground belonging to the company, the services claimed to have been rendered at the instance of Mr. Knox, the President (Tr. 22).

(2) Settlement of a claim for damages for the death of one Mitchell, an employee of the company (Tr. 22).

After his resignation from these offices Dunlap continued to act as a Director of the company only until September, 1905, when he was also elected Vice-President (Tr. 30). His claims for special services rendered during this period and that of his vice-presidency, up to the 15th day of February, 1910, are based upon alleged counsel and advice which he gave to the Superintendent "upon the general policy and welfare of the company" (Tr. 34), and upon some alleged specific services rendered in settling some claims for injuries (1) to one Alex Ursin and one Jock or Smeige and also in the case of Samuel Merton, all of whom were employees of the company and injured in its service. This was during the year 1907 and the record shows from both the testimony of Mr. Dunlap and Mr. Knox that Mr. Knox made the settlement in the instance of the first two (Tr. 36, 258-260).

(2) Services rendered in 1907 in connection with securing a reduction in certain taxes levied upon the mill properties of the company (Tr. 38).

(3) Services rendered in 1908 in connection with injuries rendered one Thomas H. Swope at the mill

of the company, settlement for which was made by Mr. Knox in the East (Tr. 42, 256-7).

Other services alleged to have been rendered the corporation during 1909 and up to February, 1910, were of such a vague, indefinite and desultory nature that they could not by any possibility be regarded as specific services rendered in an unofficial capacity. He says himself that it would be generally advising the "Secretary about stock issues, " about general business transactions, and about the " payment of notes owed at that time, signing of " notes which were authorized by resolution for " money borrowed" (Tr. 49).

In fact, there is nothing in the record to show that the plaintiff was ever specially employed or requested or directed by the corporation or its officers to do or perform any of the services for which he is claiming compensation. During the entire period covered by the alleged services, he was either the Secretary-Treasurer, a Director or a Director and Vice-President of the corporation, and the uncontradicted testimony of Mr. Knox is that these services were those usually and customarily rendered by such officers in similar corporations at the time they were so rendered in said District.

In February, 1910, the plaintiff, at a meeting of the Board of Directors, made a demand for compensation for these past services covering a period of seven years, and upon the Board refusing to recog-

nize the demand, tendered his resignation, which was accepted (Tr. 51).

At this meeting the plaintiff, at the resquest of the Board, presented a "brief" of his services (Defendants' Exhibit "B") (Tr. 241), which is a curio in documents of this character. In this "brief" plaintiff stated that the original assessment for the mill of the defendant was $100,000 (Tr. 242). It appears from the uncontradicted testimony of Mr. Lynch, one of the Directors of the company, that the original assessment as shown in the County Treasurer's books was $58,333 (Tr. 238-9-40). This was admittedly reduced to $25,000 by the County Board of Equalization upon a showing that the mill had only been in operation three months instead of a year. Mr. Dunlap, however, in his brief, took credit for a reduction of $75,000 on this assessment. The Board of Directors, relying upon this statement, and as a matter of compromise, by resolution agreed to offer Mr. Dunlap a check for $1,000. While it is true that the Court ruled out all matters in said resolution adopted by the Board in the nature of a compromise, it still permitted the skeletonized resolution to go to the jury as an admission on the part of the corporation defendant that the plaintiff was entitled to some compensation for these past services which were rendered within the scope of his duties as an officer of the company.

There was nothing in the record to show, either in the testimony offered by the plaintiff or the defend-

ant, that his services in these matters were other than gratuitous or that they were looked upon by the corporation or himself as being other than those which any director or officer of a corporation, interested therein both as such director and as a stockholder, would be willing to render in conjunction with the other officers of the Board. The only testimony of any kind looking to promise of compensation for his services was his assertion that Mr. Knox told him in numerous conversations (only one specific instance of which he could fix the date of (January or February, 1908) that "he (Knox) pro- " posed to see that his services were properly com- " pensated for"; the compensation to be provided when the company got out of debt (Tr. 72-73).

It appears from the testimony of plaintiff that the company had $175,000 in its treasury and declared a dividend of $100,000 early in 1905 and he made no claim for compensation at that time (Tr. 119-20) nor until five years later. All this time he continued to act as a Director and a part of the time as the Vice-President of the company and made no sign of discontent. During the time that plaintiff was connected with the corporation he had a private business office in town and transacted an independent business (Tr. 122). Also took employment from other companies, notably the Mizpah Extension Company, and acted as the Secretary of the Goldfield Portland Company while he was the Secretary and Treasurer of the defendant (Tr. 313) receiving

a salary of $150 or $200 and all transfer fees upon stock certificates, averaging some $45 a month.

There is nothing in the record to show that Knox as President was ever authorized to state to Dunlap that he would receive aught but the stipulated salary he did receive, as Secretary and Treasurer, or that he would be entitled to any compensation for the interest he took in the affairs of the corporation while a Director or Vice-President therein.

The President of the corporation had received no salary up to September, 1909, when as General Manager of the corporation he was voted a salary beginning at that time (Tr. 291), and the Vice-President while performing the duties of the President could be entitled to none; and it appeared that these services performed by Dunlap were of the same character of services rendered by Knox as President, who settled various claims against the corporation during the period covered by the claim of Dunlap; and in every instance save that of Merton, assisted in settling, if he did not entirely settle, all the claims for injuries in which Dunlap claimed that he rendered independent services.

There was practically no conflict in the testimony. The main contention being as to the right of the plaintiff to recover under the circumstances shown by the record.

The defendant made a motion for a nonsuit at the close of plaintiff's case, which was denied (Tr. 147).

At the close of the trial the defendant asked the Court for a directed verdict for the defendant, which was denied. The case went to the jury, which returned a verdict for the plaintiff for the sum of $7,500. Upon the judgment based on such verdict, the defendant prosecutes this writ of error and as grounds for the reversal of said judgment, assigns the following errors:

Specification of Errors.

I.

The Court erred in the admission of evidence of the plaintiff over the defendant's objection as to what services plaintiff rendered to the defendant company prior to February 15, 1906, at which time the statute of limitations began to run for the purposes of this action (Tr. p. 22).

II.

The Court erred in the admission of evidence of the plaintiff over the defendant's objection that Charles E. Knox told plaintiff that he, the said Knox, proposed to see that plaintiff's services would be properly compensated for at some future time, for the reason that it does not appear that the said Knox was properly authorized to make any such agreement with plaintiff, and that the evidence so elicited is as to an agreement with Charles E. Knox

and not with the defendant corporation (Tr. 58, pp. 71 and 72).

III.

The Court erred in the admission of the plaintiff's evidence over defendant's objection as to the value of services in the Tonopah Mining District, State of Nevada, without limiting that the value of such services were identical to those concerning which plaintiff testified (Tr. pp. 71 and 72).

IV.

The Court erred in sustaining plaintiff's objection to the question propounded to the plaintiff on cross-examination that the defendant suggested to plaintiff that he should not move his office with those of the company at the time the company's offices were removed from the Town of Tonopah up to the mine (Tr. 82).

V.

The Court erred in sustaining plaintiff's objection to the admission of a portion of the minutes of a meeting of the Board of Directors of the defendant relating to authorizing the settlement of the case of Swope against the company to recover for personal injuries (Tr. pp. 86 to 87).

VI.

The Court erred in overruling defendant's motion at the close of plaintiff's case in chief and before the

charge to the jury was given to direct the jury to find for the defendant upon the following grounds:

(1) The testimony fails entirely to show that the defendant made an express or implied contract with the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, either in his official or unofficial capacity as an officer or director of the company.

(2) The testimony fails entirely to show that the corporation or its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(3) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(4) That the plaintiff was never requested by the defendant to perform any services whatsoever on behalf of the defendant, excepting of those of Secretary and Treasurer of defendant corporation, which last services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(5) For the reason that the evidence shows that at all times the plaintiff claims to have been render-

ing services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(6) That the evidence fails to show that any services rendered by plaintiff to the corporation were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation and under circumstances similar to those carried on by the defendant in this action.

VII.

The Court erred in overruling defendant's motion at the close of plaintiff's case in chief for a judgment of nonsuit for the following reasons (Tr. pp. 147 and 148).

(1) The testimony fails entirely to show that the defendant made an express or implied contract with the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, in either in his official or unofficial capacity as an officer or director of the company.

(2) The testimony fails entirely to show that the corporation or its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(3) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(4) That the plaintiff was never requested by the defendant to perform any services whatsoever on behalf of the defendant, excepting those of Secretary and Treasurer of defendant corporation, which last mentioned services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(5) For the reason that the evidence shows that at all times the plaintiff claims to have been rendering services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(6) That the evidence fails to show that any services rendered by the plaintiff to the corporation

were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation and under circumstances similar to those carried on by the defendant in this action.

VIII.

The Court erred in sustaining an objection to the testimony of witness W. B. Alexander as to what was the assessed valuation of defendant's property in Nye County, Nevada, for the year 1907 (Tr. p. 186).

IX.

The Court erred in sustaining an objection to the testimony of Charles E. Knox as to whether or not he had received any salary as the President of defendant corporation, and as to whether or not he had ever received any salary as President of defendant corporation during the time which plaintiff claims to have rendered services to the said corporation as Vice-President thereof (Tr. pp. 248-249).

X.

The Court erred in admitting as evidence over defendant's objection that portion of the resolution set forth in the minutes of a meeting of the Board of Directors of defendant company shown on page 106

of defendant's minute book, beginning at line six therein and ending at line twenty-five therein, reading as follows:

> "Whereas at times during the past five years it has been necessary to call upon Vice-President Dunlap to perform in cases of emergency duties other than those usually designated as the duties of Vice-President, such as the exercise of his good offices in behalf of the company in case of accident to employes of this company, more particularly in the case of John Mitchell, S. Merton and others; his efforts in behalf of the company in securing a reduction of taxes on the properties of this company, more particularly the taxes for the year 1907, when the tax against the mill was $3,450, which through Mr. Dunlap's efforts was reduced $862.50, thereby effecting a saving of $2,587.50, and at the same time a reduction of $5,875 in the assessed valuation of the surface improvements, resulting in a saving of $202.88, and the separate listing of the railroad spur, effecting a saving of $78.09" (Tr. pp. 292-293).

XI.

The Court erred in admitting in evidence over defendant's objection that portion of a resolution set forth in the minutes of a meeting of the Board of Directors of defendant company adopted February 15, 1910, reading as follows:

> "It is the sense of this Board that Mr. Dunlap is entitled to some compensation for the services rendered in these matters" (Tr. p. 293).

XII.

The Court erred in refusing to give the following special instruction requested by the defendant:

> "3. The jury are instructed that the plaintiff cannot recover from the defendant for the value of any services rendered for the benefit of the defendant while he was a director of the defendant corporation, if such services were for the general benefit of the corporation."

XIII.

The Court erred in refusing to give the following special instruction requested by the defendant:

> "4. The jury are instructed that before the plaintiff can recover in this case, it must appear either by its Articles of Incorporation, or by some by-law or resolution of the Board of Directors made or passed prior to the performance of such service, that provision was made for the payment of compensation to the plaintiff."

XIV.

The Court erred in refusing to give the following special instruction requested by the defendant:

> "13. The jury are instructed that the plaintiff cannot recover compensation for services rendered in the past if it was never voted him, and if he had on several occasions acted as nothing were due him from the defendant corporation."

XV.

The Court erred in refusing to give the following special instruction requested by the defendant:

> "14. The jury are instructed that if they believe from the evidence the plaintiff did render

services beyond those usually rendered by a vice-president, director, secretary, or treasurer of the defendant corporation, and there was no promise on the part of the defendant to pay therefor; and if you believe from the evidence that there was no understanding or idea upon the part of the directors of the defendant corporation as a body, that the plaintiff was to receive compensation for such services, the plaintiff cannot recover."

XVI.

The Court erred in refusing to give the following special instruction requested by the defendant:

"17. The jury are instructed that if they find from the evidence that the defendant company had no by-laws during the period while plaintiff was secretary and treasurer of such corporation, and if they find from the evidence that there was no agreement between the defendant corporation and the plaintiff as to what services the plaintiff should perform as secretary and treasurer of said corporation, the plaintiff is presumed to perform while in the occupancy of that office such services as are ordinarily performed by such officer of other corporations, under similar circumstances, in the community where such services are rendered."

XVII.

The Court erred in refusing to give the following special instruction requested by the defendant:

"18. The jury are instructed that the plaintiff cannot recover compensation for any services claimed to have been rendered prior to February 15th, 1907."

XVIII.

The Court erred in charging the jury as follows:

"Now some testimony has been offered here tending to show what the custom and usage was governing the duties that pertain to the office of secretary and treasurer. You will understand that testimony with this instruction: in the absence of any rule of the company, of any law, or of any stipulation in any contract, regulating, describing and specifying what such services are, you may look to this custom; but in order to bind the plaintiff, Mr. Dunlap, by such custom, it must be shown that he understood, when he entered into the contract, what his duties were as defined by this custom, whatever it may be."

XIX.

The Court erred in charging the jury as follows:

"That whatever services are rendered by a director or a vice-president, within the line of his official duty, or which are necessary in the performance of his official duty, or which are incidental to the performance of his official duty, must be regarded as rendered gratuitously, and he cannot recover for them without an express contract entered into before the services were rendered; but for such services as are not required of an officer, either by law or by any by-law of the corporation, or by any rule of the corporation, and which can be performed by an agent or by a servant or by an attorney, who need not be a director and who is not a director, these may be considered as non-official duties, and as duties beyond the scope of the employment of an officer."

XX.

That the damages awarded by the verdict of the jury are excessive.

XXI.

That the verdict of the jury is contrary to law for the following reasons:

(1) That the damages awarded by the jury are excessive.

(2) The testimony fails entirely to show that the defendant made an express or implied contract with the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, either in his official or unofficial capacity as an officer or director of the company.

(3) The testimony fails entirely to show that the corporation or its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(4) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(5) That the plaintiff was never requested by the defendant to perform any services whatsoever on be-

half of the defendant, excepting of those of Secretary and Treasurer of defendant corporation, which last mentioned services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(6) For the reason that the evidence shows that at all times the plaintiff claims to have been rendering services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(7) That the evidence fails to show that any services rendered by plaintiff to the corporation were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation and under circumstances similar to those carried on by the defendant in this action.

XXII.

That the verdict of the jury is not sustained by the evidence for the following reasons:

(1) The testimony fails entirely to show that the defendant made an express or implied contract with

the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, either in his official or unofficial capacity as an officer or director of the company.

(2) The testimony fails entirely to show that the corporation or its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(3) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(4) That plaintiff was never requested by the defendant to perform any services whatsoever on behalf of the defendant excepting of those of Secretary and Treasurer of defendant corporation, which last mentioned services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(5) For the reason that the evidence shows that at all times the plaintiff claims to have been rendering services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not

entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(6) That the evidence fails to show that any services rendered by plaintiff to the corporation were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation and under circumstances similar to those carried on by the defendant in this action.

XXIII.

That the Court erred in charging the jury as in this assignment of error set forth, and that said charges were erroneous, confusing, misleading and inconsistent, for the reason

That the Court erred in charging the jury in one instance as follows:

> "In segregating unofficial from official services you will consider all the testimony in the case",

and also at a later time as follows:

> "There has been read in your hearing from the minutes of the Board of Directors of the corporation for February 15th, 1910, a recital to the effect that it is the sense of the corporation that the plaintiff should be allowed some compensation for services therein mentioned. The

fact that this admission was made after the performance of the acts mentioned rather than before does not detract from its efficiency as an admission of the fact that the directors then present stated that the services mentioned in the resolution were without the scope of the official duty of Mr. Dunlap; nor does it detract from this as an admission that at the time the resolution was passed these directors regarded the services not as gratuitous."

Argument.

The contention of the defendant is:

I. That the plaintiff had no cause of action against the defendant for services rendered in that the same were not shown to be without the scope of his duties as a Director, Secretary and Treasurer or Vice-President of the Board of Directors.

II. That assuming *pro argumenti* that such services were unofficial, they were of a purely voluntary character rendered at odd times and of which the Board of Directors had no understanding they were to be paid for, and had no power to bind the corporation by agreement to compensate therefor long after their rendition.

III. That the major portion of said claim for services, if any existed, i. e., for those alleged to have been rendered between January, 1903, and February, 1906, was barred by the Statute of Limitations of the State of Nevada.

In considering the questions involved herein, we, while urging all errors assigned, shall consolidate Errors 2, Subdivisions 1, 2, 3, 4, and 5 of Error 6, Errors 12, 13, 14, 15, 19, Subdivisions 1 and 2 of Error 21, and Subdivision No. 1 of Error No. 22 for purposes of argument, discussing them as a whole. These errors are so inter-related that the proposition of law involved in each is practically the same and may be discussed with reference to all.

I.

As a basis for the assignment of these errors we urge as a fundamental proposition of law that,

> **A director or officer of a corporation cannot recover compensation for services rendered such corporation excepting upon an express contract made with the corporation prior to the rendering of such services; or upon an implied contract to pay for services performed under such circumstances as to show that it was well understood by the officer and director rendering the services and by the corporation, that such services were not to be gratuitous.**

Neither of these conditions was shown to exist in this case. Indeed there was no attempt to show on the part of the plaintiff that he had an express contract. And the implied contract relied upon by him was based upon the fact that he had rendered certain services which he claimed were without his official duty, and that Mr. Knox had at various times stated to him that he would see that he was com-

pensated therefor, which statement, if made, could be no more than a mere personal guaranty on the part of Mr. Knox for there is not a scintilla of evidence that the latter had any authority, express or implied, to bind the corporation by any such statement.

Plaintiff claimed to have rendered many of these services prior to February, 1905, during all of which time he was the Secretary-Treasurer of the Board. In February of that year he demanded an increase in his salary from $200 to $300 and it being refused resigned from those offices.

One of the particular bits of evidence on which plaintiff relied was a resolution passed at this time by the Board (and doubtless drawn by himself as Secretary) commending him for his past services (Tr. 28).

This resolution plainly indicates that, at that time, the corporation had no knowledge whatever of the fact that Mr. Dunlap was expecting compensation for these alleged services, which included the much vaunted services regarding the patents of the company, and his attention to the Mitchell claims. On the contrary it undoubtedly considered them as among the services which had "earned for him the "'*warmest appreciation*' of the Board and Stock-" holders", and the "*gratitude*" of all persons interested in "the development of the District".

This was then the opportunity for the plaintiff to have demanded compensation for these services

and to have placed on record in the minutes a claim for compensation therefor. But he makes no such claim, and the Board recognizes no claim excepting the moral one of appreciation of what he has done and goes on to assert the feeling of gratitude of the Board that the corporation is to continue to reap the benefits of his "wise counsel" by virtue of the fact that he is still to continue as a director.

It is plainly evident that at this time the services rendered by the plaintiff were considered by the corporation, through its Board of Directors, as purely those of a volunteer, interested in the corporation it is true, as an officer, even though they might not possibly be deemed strictly in line of his duty as such officer.

A director is as one of the trustees of the corporation, interested with the direction and management of its business and in a more or less new community like Tonopah and with a corporation struggling to obtain a business standing, it is not unusual for the officers to take a keen personal interest in the promotion of its interests even to the extent of voluntarily performing services that might be deemed more or less unusual in their natures, such services naturally redounding to their own interest, as a member or stockholder of the corporation.

But the services rendered were not unusual in their nature. It appears from the uncontradicted testimony of Knox (Tr. 303) that it was customary at that time and place for the Secretary-Treasurer

to render just such services as were rendered by Dunlap during his incumbency of this office.

As was said by the Supreme Court of Wisconsin, in the recent case of Swedish-American Bank v. Koebernick, 117 N. W. 1021, 1022, in referring to the duties of presidents and secretaries of corporations,

> "Both are general officers of such corporations who often perform interchangeably a wide range of duties. Indeed it is a matter of common knowledge that the presidents and secretaries of ordinary private corporations perform much the same functions in the conduct of corporate business enterprises that are performed by general partners in a copartnership business."

We maintain, however, that even were we to admit that such services were to come under the rule of services outside of his official capacity, there must still have been, if not an express contract, a promise implied from all the circumstances to pay therefor. The resolution introduced by the plaintiff himself precludes any idea on the part of the corporation that it considered the services as other than gratuitous, and places plaintiff entirely without the rule that where there is employment without understanding as to definite payment, there is still an implied promise to pay something in the future.

> "From the service of a director the implication is that he serves gratuitously. The latter presumption prevails in the absence of an understanding or an agreement to the contrary when directors are discharging the duties of

other offices of the corporation to which they are chosen by the directory such as those of president, secretary and treasurer * * *

"The fact is, however, that in the active and actual business transactions of the world, many officers of corporations, who are also members of their Boards of Directors, spend their time and energies for years in the interest of their corporation, and greatly benefit the owners of their stock, under agreements that they shall have just, but indefinite, compensation for their services. We are unwilling to hold that such officers should be deprived of all compensation because the amounts of their salaries were not definitely fixed before they entered upon the discharge of their duties. A thoughtful and deliberate consideration of this entire question, and an extended consideration of the authorities upon it, has led to the conclusion that this is the true rule: *Officers of a corporation who are also directors, and who, without any agreement, express or implied, with the corporation or its owners, or their representatives, have voluntarily rendered their services can recover no back pay or compensation therefor; and it is beyond the powers of the Board of Directors, after such services are rendered, to pay for them out of the funds of the corporation or to create a debt of the corporation on account of them.*"

National Loan & Investment Co. v. Rockland Co., 94 Fed. 339.

This case, we think, expresses the rule clearly as applicable to this case.

An examination of the testimony of Mr. Dunlap in relation to the specific instances of services ren-

dered will show that there never was any definite employment.

Take for instance the matter of the services rendered before the Board of Equalization in order to have the taxes reduced on the mill of the company for the year 1907. We quote this testimony on cross-examination as follows:

"Q. And don't you know that you voluntarily made that remark, 'I am going up there anyway on that day, and I will attend to it myself'?

A. No, sir, I do not.

Q. You don't know?

A. No.

Q. But you may have made that remark, may you not?

A. There is no reason why I should have gone there except for this matter.

Q. Did anyone tell you to go?

A. I do not recall that they did.

Q. *You did it voluntarily, did you?*

A. *I did it in the interest of the company.*

Q. *You did it in the interest of the company?*

A. *Yes, sir.*

Q. *Did anyone connected with the company suggest that you be paid for performing that service?*

A. *At that particular time, that particular service?*

Q. *Yes.*

A. No, sir.

Q. *At any of these times when the Board of Directors was in session was there any suggestion made with reference to compensation to you for this service which you were claiming to have been rendering?*

A. *No, sir.*" (Tr. 101.)

It will be seen from the foregoing that the alleged services in connection with the Board of Equalization were purely voluntary upon the part of plaintiff and performed as he says in the interest of the company, which as a Director of the corporation, being also a stockholder, he would be supposed to have at heart.

Upon this point, the testimony of Mr. Knox is corroborative of the fact that these services were purely voluntary. In referring to the proceedings of the Board of Directors at a meeting held in the fall of 1907, in discussing this over-taxation of the company's mill, he says:

> "And the instruction was to the Secretary to write a letter to the Board of Commissioners about the overcharge, and ask for a reduction; Mr. Dunlap was present, and said, 'I am going before the commissioners on next Tuesday, and I will take it up', and I said, 'All right'." (Tr. 263.)

And again, at page 287:

> "Q. Your recollection is, at any rate, that after some discussion of the matter, that Mr. Dunlap volunteered that he would go before the Board and endeavor to secure a reduction?
>
> A. The following Tuesday, yes, sir.
>
> Q. Was that acquiesced in?
>
> A. Yes, sir, that was acquiesced in.
>
> Q. Was he not by yourself requested to do so?
>
> A. No, if it was it was the first time I ever had a chance to ask him; he usually volunteered to do things.
>
> Q. Do you have a clear recollection whether you requested him to do so or not?

A. No, I have a recollection of the statement, 'I am going before the Board next Tuesday anyhow, and I will take it up', and I think it was merely acquiescence of the Board, but not a request.

Q. Your recollection of the statement is that it conveyed the idea that he had other business before the Board?

A. Yes, sir and to be specific, I thought it was Round Mountain business that he was going on."

This testimony of Mr. Knox is absolutely uncontradicted. It will therefore be seen that the specific service rendered in reference to going before the Board of County Commissioners was not requested by anyone connected with defendant corporation, but that plaintiff went as a volunteer and upon the understanding by defendant corporation that said services were to be gratuitous, plaintiff then being a member of the Board of Directors of the corporation.

Again we beg to call the attention of the Court to the following testimony of plaintiff:

"Q. You never made any claim for special services rendered in securing the patents, in connection with that?

A. *I did not.*

Q. When did you first speak of that to the Board of Directors; when did you first ask for compensation from the Board of Directors for rendering those services?

A. The 15th day of February, 1910."

From the foregoing it will be seen that a portion of the services for which plaintiff is suing, were

rendered almost seven years prior to the time when he made any claim for compensation.

"Q. Do you know whether or not the corporation expected to pay you for those services?

A. *I felt* that they did.

Q. Do you know whether they expected to, Mr. Dunlap?

A. It is pretty hard to know what a corporation expects to do.

Q. Can you remember whether or not on the date of your resignation in 1905, you expected to receive further compensation for past services?

A. I certainly did.

Q. What induced you to expect that?

A. *Conversations with the President and General Manager of the company in regard to matters of that kind.*

Q. And *nothing else?*

A. *Nothing else.*" (Tr. 116.) * * *

"Q. *You had had a previous promise from the company that they would pay you when the company was out of debt?*

A. *No, sir, not from the company;* I had had talks with Mr. Knox along that line, to the effect when we got into a condition,——

Q. Am I to understand you, and the Court and jury to understand you, that you had a promise from the company or from Mr. Knox that you would be paid some compensation when the company was out of debt, the promise being made prior to this date of February, 1905?

A. The first conversation when that took place was prior to that date.

Q. And the company was out of debt then?

A. It was not stated, Mr. Thayer, I beg your pardon, when the company was out of debt, specifically, that was to be paid, but that he and

I were to be partly compensated for what we were doing when the company got into condition to do it; after they had equipped their plant and were making money.

Q. Well, the company was in position to do it then, was it not?

A. Not with the contemplated building of the mill.

Q. *But they divided one hundred thousand dollars in dividends?*

A. *They did.*" (Tr. 120.)

And again that Knox stated to him that,

"Let this matter come out as it may, when we get out of debt and on Easy Street, *I propose to see that your* services are properly compensated for." (Tr. 72-73.)

From the foregoing it will be seen that plaintiff bases his claim not upon any understanding with the company or its Directors as a Board but upon some vague talks with the President of the defendant corporation, who was alleged to have stated that he and plaintiff were to receive compensation, and upon a broad assertion that Knox *proposed to see* that his services were compensated for when the company got out of debt.

Can this statement by any means be tortured into an employment by Knox of Dunlap to perform the services alleged to have been rendered, for it is only upon an employment by Knox that Dunlap could hope to recover and upon which he relies? Or is it not merely a personal guaranty on the part of Knox, that in view of the services voluntarily rendered, he,

Knox, would use his endeavors to see that the corporation gave him some compensation?

Can such alleged assertions, guarantees or promises be held binding upon the corporation years after the services were voluntarily rendered, gratuitously from the point of view of the corporation, as is evidenced by the resolution of the Board adopted in 1905, and would the stockholders be held bound by any recognition of such promises, guarantees or assertions of Knox which the record shows were utterly without foundation in authority?

We think this Court will not hold that any such circumstances or facts bring the plaintiff within the rules governing in cases of this kind, and there is no contradiction of such facts.

In the case of Wood's Sons Co. v. Schaefer, 173 Mass. 443 (73 Am. St. Rep. 305), which was an action against a corporation for services rendered, the point was made that one of the Board of Directors made a promise to the plaintiff that he should be President of the corporation with a certain salary. The Court says:

> "It does not appear that Wood's alleged promise ever was communicated to the other directors, and there was nothing in the circumstances that would leave it more than a conjecture that the reasonable interpretation of the defendant's coming there would have been that *he expected to be paid.*"

What more does plaintiff testify to? He frankly admits that he never had any employment from the

corporation; that he performed these services expecting to be paid and that he *felt* the corporation expected to pay him. "That it was pretty hard to "know what a corporation expects to do." That is pretty slim authority on which to bind the stockholders of this corporation to pay him $7,500 for services which the record shows were either rendered by him in his official capacity or as a pure volunteer. And he does not make the slightest attempt to connect the corporation with these alleged promises of Knox which are flatly denied by the latter.

See Tr. 264, where the following appears:

> "Q. Did you know that he expected compensation for the services which he was rendering at the time?
>
> A. No, I did not.
>
> Q. When did you first learn that he expected compensation for such services?
>
> A. February 14th, 1910.
>
> Q. So far as you know, as the executive head of this corporation, was Mr. Dunlap ever requested to do anything for the corporation from the time that he resigned as Secretary and Treasurer, outside of the duties of a Vice-President and Director?
>
> A. No, unless Mr. Dunlap's statement that he would go before the commissioners, for instance, unless an acquiescence to that would be an instruction; I would not so consider it." (Tr. 265.)

Furthermore, an examination of the record discloses not an iota of testimony to the point that any requests were ever made by the defendant corpora-

tion for the performance of any of the alleged sporadic services, rendered at intervals throughout seven years and for which no compensation was asked until February 14, 1910.

It will be noted that plaintiff stated that these services were to be compensated for when the corporation was out of debt or in funds. Is not the declaration of a dividend of $100,000 an indication of being in funds? Plaintiff testifies that the company had $175,000 in its treasury in 1905 and then declared a dividend of $100,000 but he made no sign. What other legitimate conclusion can be deduced from such behavior than that he had been rendering these services voluntarily and gratuitously and the presentation of a claim was purely a secondary thought? Otherwise why did he not press his claim at the time the dividend was declared, if he really thought he was entitled to compensation for the services rendered?

Why did he not at the time he made an application for a raise in his salary to $300 present his claim for these alleged services? Why did he continue to perform services thereafter as he alleges up to February, 1910, with no definite employment and no definite compensation provided for, when the corporation did not see fit to recognize his entire services as of the value of $300 per month? Is it not a curious thing that in view of the attitude of the corporation, the low pecuniary estimate placed upon his services judging from the refusal of the Board

to increase his pay (although expressing "appreciation" for his past services and hopefulness that he would continue as a Director to give them the benefit of his "wise counsel"), that he should have continued to give this "wise counsel" to the Board without any agreement for compensation therefor? This in view of the further fact that it is this very "counsel" that he places reliance upon as one of the elements going to make up his past services at that time and the services thereafter alleged to have been rendered?

It will be noted in this connection that during the period plaintiff claims to have rendered these services for which he asks compensation, he emphatically states that he had nothing to do with the actual operation or development of the property of the company, and that there was a superintendent and general manager employed to attend to that end of the company's business, his services being in the nature of consultation and advice with these officers.

Upon this point of continuing to serve under the circumstances stated, we think the case of Kirkpatrick v. Penrose Ferry Bridge Co., 88 Am. Dec. 497, is pertinent where the Court says:

> "Corporate officers have *ample opportunity to adjust and fix their compensation before they render their services, and no great mischief is likely to result from compelling them to do so.* But if, on the other hand, actions are to be maintained by corporate officers for services, which, however faithful and valuable, *were not rendered on the foot of an express contract,*

there would be no limitation to corporate liabilities, and stockholders would be devoured by officers."

See also

Loan Association v. Stonemetz, 29 Pa. St. 532.

In the case of Doe v. Northwestern Coal & Transp. Co., 78 Fed. 62, Judge Gilbert of this Circuit cites approvingly the two cases last cited and quotes from the latter as follows:

> "It is well settled that a director of a corporation *is not entitled to compensation for services performed by him as such without the aid of a pre-existing provision expressly giving right to it.* They are the trustees for the stockholders, and as such, have the management of the corporate affairs. And to permit them to assert claims for services performed, and then support them by resolution, would enable the directors to unduly appropriate fruits of corporate enterprise. It would clearly be contrary to sound policy."

In the case of Brown v. Republican Mt. Silver Mines, 30 Pac. 66 (Col.), the Court said:

> "The ground for defendant's motion for nonsuit was that there could be no recovery in the case, since there was no evidence of an express agreement or arrangement between the plaintiff, Brown, and the defendant company by which he was to have compensation for the service sued for. The doctrine is generally accepted that directors of a corporation are not entitled to compensation for their services as directors unless such compensation is provided for or expressly sanctioned by the charter. Without such authority, the directors cannot lawfully

vote compensation to themselves for the performance of their ordinary duties, nor can they accomplish such end indirectly; as by designating one of their number 'Managing Director', and giving him a salary for the performance of such ordinary duties as are devolved by the charter upon the Board of Directors.

* * * * * * * *

"Some modern decisions announce a more liberal rule, to the effect that for services rendered by a director, not embraced in his ordinary duties as such, his employment by the corporation, and its promise to pay therefor, may be implied or inferred from the facts and circumstances of the case, thus allowing a recovery as upon a quantum meruit. *There are many reasons for adhering to the more stringent rule. Ordinarily the directors of a corporation are intrusted with extensive powers in the management of its affairs. They occupy positions of trust and confidence with reference to the corporate body and its stockholders. The relation is of a fiduciary character.*"

Plaintiff's relations as a Director of defendant corporation, to the stockholders of said corporation was of a fiduciary nature. He must exercise the highest good faith in his dealings with them. The Court says further:

"But, even if the more liberal rule may be resorted to in some cases, it certainly should be held that a director cannot recover compensation for services rendered by himself to his corporation upon an implied contract, *unless it be established by a clear preponderance of the evidence—First, that the services were clearly outside his ordinary duties as a director; and, second, that they were performed under circum-*

stances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation.''

See also

Redbud Realty Co. v. South, 131 S. W. 340 (Ark.),

where the Court said:

"The president of the corporation is not entitled to any compensation for performing the ordinary duties of his office, unless a contract to that effect is made with him by its governing body. The contract may, however, be implied on the part of the corporation to pay its president for special services rendered outside of the ordinary duties of the office. The question of whether or not there was an implied contract to this effect is one of fact rather than of law. In considering whether or not such a contract has been approved, the nature of the corporation and its business, the nature and extent of the services rendered, the comparative amount and value of the services of other officers of the corporation, and all other circumstances of the case must necessarily be looked at and weighed, *and it must also be considered whether or not the services were performed under circumstances showing that it was understood by the proper officials of the corporation, and by the officer rendering the services that they were to be paid for.''*

The two elements necessary for plaintiff to have shown in this case were therefore that the services were actually without the line of his duties, and *an actual understanding* by the proper corporate officers as well as himself that his services were to be

paid for. Such understanding on the part of the corporation there was a signal failure to prove. The evidence clearly shows this beyond a doubt. It is apparent that nowhere was the corporation as a *body* ever notified of the fact that plaintiff claimed compensation for these alleged services until years after they were rendered, that is, in February, 1910. He does not even attempt to fix any such knowledge on the corporation. He says in substance, Knox knew I expected compensation. I *felt* that the corporation knew it. But it nowhere appears in the record that if Knox knew Dunlap expected compensation that he ever communicated such knowledge to any one of the Directors, much less to the corporation as a body.

In this regard we desire to call the attention of the Court to the case of

> Gill v. N. Y. Cab Co., 1 N. Y. Supp. 202 (48 Hun. 524).

The Court says:

> "An examination of this evidence, however, fails to show that there was any understanding or idea, upon the part of the directors of this corporation, *certainly as a body,* that the plaintiff was to receive any compensation for his services except his salary as Vice-President. *The evidence upon the part of the plaintiff himself tends to confirm this view, in that the only claim that he ever made to the corporation during the time that these services were rendered was that his salary as Vice-President should be raised.* If his present claim is correct, then, even if his salary as Vice-President had been

> raised, *and he had performed services outside of the duties belonging to the office of Vice-President, his right of action to recover therefor would have been precisely the same as it is now, his salary not having been raised. The necessary conclusion to be drawn from this circumstance is that he considered that the compensation for those services which he was rendering to the company was to be paid for by the salary which he drew as Vice-President.*"

This case is in point in that plaintiff herein requested Knox as a Director of the defendant corporation to support his demand for an increase of salary at a meeting of the Board of Directors, from $200 to $300 per month. If plaintiff had expected or thought he was entitled to extra compensation, or compensation for his alleged services other than his salary, we contend that he would not have asked for an increase in his salary as Treasurer and Secretary, or upon its refusal would have made a demand for this special compensation.

The case of O'Brien v. John O'Brien Boiler Works, 133 S. W. 347 (Mo.), decided January 11, 1911, was an action to recover compensation for services alleged to have been rendered as general superintendent of a corporation. One of the counts sought a recovery on a quantum meruit. The Court says:

> "This case presented a very simple issue, and there should have been no room for error. It should have gone to the jury on the sole question of whether Mr. O'Brien was employed as general superintendent of defendant, under an implied contract of employment for hire, and,

> if so, what was the reasonable value of his services. He was an officer and director of the defendant and could only be entitled to compensation for any services rendered when compensation for his services was provided for, either in the company's articles of association, in its by-laws, *or by resolution of its Board of Directors passed before the services were rendered;* or, *being services outside of his duties as Director or Vice-President, and he was both when the services are said to have been rendered,* whether they were performed at the instance of its directors or an officer having general power 'upon an implied promise to pay for such services, when they were rendered, *under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for or ought to have so intended and understood.*"

In applying the doctrine of the case just cited to the case at bar, we contend that the alleged services were not rendered "under such circumstances as to " raise a fair presumption that the parties intended " and understood they were to be paid for or ought " to have so intended and understood". We have shown that the only foundation for plaintiff's expectation that his services would be paid for, was the alleged guaranty of Knox that he would see they were compensated for. Any understanding that they were to be paid for rested entirely and alone upon the power of Knox to bind the corporation.

But there was absolutely nothing shown on the part of plaintiff that would even tend to prove that Knox as President had any power to bind the corporation by contract.

The record shows admittedly that the corporation adopted no by-laws until September, 1907 (Tr. 248), four years after some of these alleged services were rendered, and the services even if contracted for by him would have been entirely without his authority.

> "The President of a corporation has no power to buy, sell or *contract* for the corporation, nor to control its property, funds or management."
>
> 2 Cook on Corporations, 4th Ed., Sec. 716;
>
> 4 Thompson on Corporations, Secs. 4613, 4617;
>
> Groetlz v. Armstrong S. E. Co., 89 N. W. 21.

In the case cited, the articles of incorporation provided that the managing board of the corporation should consist of a certain number of directors, the by-laws to provide for the duties of the individual officers. No by-laws were adopted. The President attempted to make a contract to pay a commission on a sale of real estate for the corporation. In holding that such contract was not binding on the corporation, the Supreme Court of Iowa quote approvingly the two text writers cited, and say:

> "However, whatever may be his presumptive power in general, we think there can be no controversy as to the rule that, where the general power to make contracts for and manage the business of the corporation is conferred upon the Board of Directors, that power cannot be exercised by the President alone."

During a portion of the period covering the rendition of these alleged services, the plaintiff was Vice-

President of the corporation. No salary attached to that office or to the office of President. The services rendered were not shown to be other than those usually rendered by similar officers in corporations of a like nature at that period and in the neighborhood where rendered. When Dunlap accepted the office of Vice-President he knew that in the absence of the latter as President he would be compelled to perform whatever duties fell to the President and that the latter served without salary. Whatever other services he performed during that period, he voluntarily performed on his own initiative out of an excess of zeal, which while no doubt meritorious, cannot be said to warrant him in violation of well established principles of law, to bind the corporation to pay him thousands of dollars therefor in the absence of any understanding that he was to be paid.

It is further clear that no one expected to pay him for these casual services in and about the settlement of the various claims for damages from the fact that the other directors and officers, Knox, Lynch and Alexander, were all acting and exerting their efforts to do what was best for the corporation in this regard, and what Dunlap did was only natural and in line with his duty as a director and officer of the corporation.

In the case of Caho v. Norfolk & S. Ry. Co., 60 S. E. 640, from the Supreme Court of North Carolina, plaintiff rendered services to the railroad as attorney and President at the request of said com-

pany, and expended money in advertising, which it was alleged was promised and agreed to be paid plaintiff. The Court says:

> "That no cause of action is stated, for that there is no averment that any salary was affixed to the office of President prior to February 27, 1906. The authorities cited by counsel for defendants amply sustain his contention that, in the absence of an express promise *made prior to the performance of the service,* an officer of a corporation cannot maintain an action for compensation; that he cannot sue upon a quantum meruit."

The Court cites 21 Am. & Eng. Ency. of Law, 906, and further says:

> "The authorities are uniform. If the law were otherwise, stockholders and creditors of corporations *would have no protection against confiscation of the corporate property by reckless extravagance, or corrupt combination of officers and directors to impose debts and liabilities for past services.* A stockholder would never be able to know the value of his stock, or a creditor the amount of debts for which the corporation is liable. Where power is conferred by the charter upon directors to elect officers and fix their salaries, the power must be exercised at the same time and not left open for future adjustment. *It is but just to all persons concerned that the expenses incident to operating the business of the corporation, so far as salaries are concerned, shall be fixed and made a matter of record.* This complaint presents a striking illustration of the 'wisdom of the law'."

See also

Notley v. First State Bank of Vicksburg, 118 N. W. 486 (Mich.);

Deal v. Inland Logging Co., 100 Pac. 157 (Wash.);

Gaul v. Kiel & Arthe Co., 118 N. Y. Supp. 225;

Althouse v. Cobaugh Colliery Co., 76 Atl. 316 (Pa.);

McCarthy v. Mt. Tecarte Land & Water Co., 111 Cal. 328.

We expressly call the attention of the Court to the case of

Althouse v. Cobaugh Colliery Co., 76 Atlantic 316.

There the plaintiff, a mining and civil engineer, who was President of the corporation, had performed services for the benefit of the corporation in surveying, procuring rights of way and building a railroad and bridge together with other services, which were admittedly without the line of his official duties.

In holding that he was not entitled to be compensated therefor, the Court said, applying the principle laid down in the case of Brophy v. American Brewing Co., 61 Atl. 123:

> "The plaintiff during the whole period for which he claimed compensation for services was an acting director and a member of the executive committee of the Board of Directors. He came therefore within the reason of the settled

> rule that a corporate officer cannot recover compensation for services rendered the corporation *unless there was an express contract of employment before the services were performed.* * * *
>
> "The instruction that there could be no recovery on the basis of a quantum meruit for services rendered was right."

In examining the propositions of law involved in this case in all instances where compensation was allowed to an officer of a corporation for services rendered by him to the same without an express contract as to definite compensation having been first made, the facts showed that the officer was elected to perform the services or requested by the corporation to perform the services after his election, or that his services were constantly engaged at the request of the Board of Directors or of a majority of the corporation.

In those cases naturally the officer would come within the provisions of the rule governing when definite services are performed without a definite sum being stipulated therefor, but which services are performed with the understanding that they would entitle him to some compensation to be rendered in the future. In this case it is clear that whatever services were rendered by the plaintiff were so rendered voluntarily upon his own initiative and there is nothing in the record to show that he did anything more than what other officers of the corporation did without compensation being paid therefor.

And the plaintiff does not attempt to show nor does the record disclose in any respect that any of these services were unofficial in their character or were entirely outside of what might have been expected of him to perform either as Secretary and Treasurer, Vice-President or as a Director of the Board.

The defendant requested the Court to give the following instruction:

> "The jury are instructed that if they believe from the evidence the plaintiff did render services beyond those usually rendered by a Vice-President, Director, Secretary or Treasurer of the defendant corporation, and there was no promise on the part of the defendant to pay therefor; and if you believe from the evidence that there was no understanding or idea upon the part of the directors of the defendant corporation as a body, that the plaintiff was to recover compensation for such services, the plaintiff cannot recover." (Assignment XV.)

The Court refused to give this instruction as presented. It is based upon the law cited in the foregoing cases and is almost an exact expression of the principle of law controlling in this case, if we are right in our contention.

While it is true the Court read this instruction to the jury, it read it with the following modification thereof:

That will be understood with the instructions I have given you before. *You are at liberty to infer*

if you find it proven by a preponderance of the evidence that these services were not intended as a gift.

The language last quoted completely eliminates any action or understanding upon the part of the corporation as a body that plaintiff was to receive compensation, and is entirely inconsistent with the language in the body of the instruction. It practically says:

> "If you believe that there was no understanding or idea on the part of the corporation to pay then plaintiff cannot recover. But you can allow him to recover if these services were not intended as a gift."

There could be no other understanding by the jury of this instruction than that they were at liberty to consider the intention of the plaintiff as controlling to the complete exclusion of any understanding on the part of the defendant as to the gratuitous nature of the services.

We call the Court's attention also to the error of the Court in charging the jury as set forth in Assignment XIV, as follows:

> "That whatever services were rendered by a Director or a Vice-President, within the line of his official duty, or which are necessary to the performance of his official duty, or which are incidental to the performance of his official duty, must be regarded as rendered gratuitously and he cannot recover for them without an express contract entered into before the services were rendered; *but for such services as are not required of an officer, either by law or by any*

by-law of the corporation, and which can be performed by an agent, or by a servant or by an attorney, who need not be a director and who is not a director, these may be considered as non-official duties and as duties beyond *the scope of the employment of an officer.*"

This instruction is vague and uncertain in its character and does not properly state the law. The Court therein instructs the jury what services must be rendered gratuitously by a Director or Vice-President and then goes on to state what may be considered unofficial services, from which no other deduction is to be drawn in the light of the case at bar than that such services are to be paid for whether contended for or not.

If no such deduction is to be drawn, then the instruction is as we have stated, vague, ambiguous and uncertain. If such deduction is drawn then the instruction fails to state the law properly as it eliminates any question of a contract for such unofficial services either express or implied, with the corporation and leaves the jury to the impression that a Director or Vice-President of a corporation may voluntarily render any character of services outside of his official duties, with no understanding that he shall perform the same, and with no understanding that he shall be entitled to compensation therefor, and yet he can hold the corporation liable for his compensation in thousands of dollars as in the case at bar.

This is no more the law with reference to a corporation than with relation to contracts between individuals.

In the case of Mallory Con. Co. v. Fitzgerald, 137 U. S. 96 (34 Law Ed. 608), Chief Justice Fuller cites approvingly the case of Pew v. First National Bank, 130 Mass. 391, 395, as follows:

> "A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied promise to pay for them. *It often happens that persons render services for others which all parties understand to be gratuitous.* Thus, directors of banks and of many other corporations, usually receive no compensation. In such cases, however valuable the services may be, the law does not raise any implied contract to pay by the parties who receive the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, *but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefited by them would and ought to understand that compensation was to be paid for them.*"

The refusal of the Court below to give the following instruction requested by defendant which was in line with the law hereinbefore cited, was error, viz.:

> "The jury are instructed that the plaintiff cannot recover compensation for services rendered in the past if it was never voted him, and if he had on several occasions acted as if nothing were due him from the defendant corporation." (Assignment XIV.)

Nowhere in the record is there any instruction of a similar nature to be found. The instruction is based upon law, and is borne out by the facts in the record, notably the failure of the plaintiff to ever request any compensation for his services until seven years after the first alleged services were rendered; his resigning his office as Secretary and Treasurer with these alleged services uncompensated for according to his theory; his acceptance of the commendatory resolution passed in 1905 voting him "thanks"; his knowledge of the fact that the Board was in funds of $175,000 at one time and paid dividends covering $100,000 while he was a member of the Board.

All these constituted elements tending to show no implied contract to pay and decidedly no knowledge or expectation of payment on part of the corporation and a failure of any right on the part of the plaintiff to exact the same. The jury should have been instructed along the lines proposed. Failure to do so left the jury uninstructed upon a vital point of law and constitutes error.

> "An officer cannot recover a past due salary when it was never voted him and he had on

several occasions acted as though nothing was due him."

Pyper v. Salt Lake Amusement Co., 21 Utah, 57 Pac. 533.

II.

The Court erred in overruling the objection of the defendant to the introduction of any testimony bearing upon alleged services rendered prior to February 15, 1906, on the ground that the claim for services, if any, rendered prior to that time was barred by the Statute of Limitations of the State of Nevada which had been specifically pleaded by the defendant (Tr. 12). (Assignment No. 1.)

It is provided by Section 3718 of the Compiled Laws of the State of Nevada, that

> "Actions other than those for the recovery of real property can only be commenced as follows: * * * within three years * * * An action upon a contract, obligation or liability not founded upon an instrument in writing."

The claim of plaintiff for these alleged services is based upon an oral contract, if any. He could not hope to sustain his claim for any such services rendered prior to the 15th day of February, 1906. Therefore any testimony relative thereto was incompetent and inadmissible.

Plaintiff was questioned as to services rendered during the year 1904. Defendant interposed an ob-

jection on the grounds that the statute ran as to such alleged services; but the Court overruled the objection and permitted all of this testimony to go in (Tr. 22). That this testimony was inadmissible and incompetent would not seem to need citation of authority.

III.

The Court erred in charging the jury as follows:

> "In segregating unofficial from official services, you will consider all the testimony in the case,"

and a little later and in the same connection following with this instruction:

> "There has been read in your hearing from the minutes of the Board of Directors of the corporation for February 15, 1910, a recital to the effect that it is the sense of the corporation that the plaintiff should be allowed some compensation for services therein mentioned. The fact that this admission was made after the performance of the acts mentioned rather than before does not detract from its efficiency as an admission of the fact that the Directors then present stated that the services mentioned in the resolution were without the scope of the official duty of Mr. Dunlap; nor does it detract from this as an admission that at the time the resolution was passed these directors regarded the services not as gratuitous." (Assignment XXIII.)

We contend that this instruction constitutes on its face reversible error in that it is in complete antag-

onism to the law controlling in this case, and to the propositions of law as laid down in the balance of the charge of the Court.

It will be remembered that on the trial, over the objection of the defendant there was admitted in evidence a portion of the minutes of the Board of Directors passed on the 15th day of February shortly before the institution of the action (Tr. 135).

This resolution on its face purported to be an offer of compromise on the part of the Board of Directors of the defendant, as a means of settlement of the alleged claim for services theretofore rendered by the plaintiff and for the purpose of settling the matters then in dispute between the defendant and plaintiff. The whole resolution was read in the presence of the jury and the Court attempted to segregate the portions thereof which were offers of compromise from the alleged recitals concerning the *opinion* of the directors as to whether or not the previous services rendered by Dunlap were meritorious or were worthy of compensation.

In doing so, however, the jury had the full benefit of the illegal evidence as to a proposed compromise and no attempt was made upon the part of the Court to in terms disabuse the minds of the jury relative to the value to be given to such evidence in the charge thereafter given relative to the portion of the resolution which presumptively the jury alone were to consider, and this offer of compromise, such

as it was, could not but have had some effect upon the minds of the jury.

This resolution simply expressed the *opinion* of the Board as to whether the plaintiff was entitled to some compensation or not. That opinion might just as well have been that the plaintiff was entitled to the full compensation thereafter sued for, viz.: $20,500.

If we are right in our contention as to the law controlling in this case, as shown by the authorities hereinbefore cited, the plaintiff could only recover in this action upon either an express contract (which is not relied upon) or upon an implied contract to pay a reasonable compensation for the services rendered, (after proof of their unofficial character) the services being rendered with the understanding on the part of *both* parties that they were to be paid for, even if no definite compensation had been determined upon.

The resolution therefore was incompetent, irrelevant and immaterial, because it is apparent that the offer made therein was entirely without consideration, as the Board of Directors could have had no power to make the payment, which if made would have been voidable, at the instance of the stockholders.

This resolution did not in any manner tend to establish the fact that the corporation had received from plaintiff services which it was legally bound to compensate.

If the Board had resolved to pay and had paid the full amount asked for by the plaintiff (which they might with equal right under the position taken by plaintiff, have done) in any stockholders' action brought to recover the amount against the individual members of the Board, the very question at issue would have been whether the plaintiff had any legal claim against the corporation and surely this resolution reciting the opinions of the Board that he had performed services and that "it was the sense " of the corporation that he was entitled to some " compensation" therefor, could have no weight. The real nature of the services and their real value would be the question to be determined, not the motives actuating the individual directors in arriving at a conclusion to vote plaintiff some compensation; motives that might perhaps have been far from a consideration of the interests of the real parties to be considered, the stockholders.

We maintain that this resolution even as skeletonized should never have been permitted to go to the jury as evidence, under the principle of law controlling in this case, and hold that for its alleged admission alone the case should be reversed. (Assignment X.)

"Otherwise", we may say in the language of the Supreme Court of North Carolina in that case of Coho v. Norfolk & S. Ry. Co., Idem:

> "stockholders and creditors of this corporation *would have no protection against confiscation of the corporate property by reckless extravagance,*

> *or corrupt combination of officers and directors to impose debts and liabilities for past services.''*

That the Board of Directors in this instance did not vote the full amount asked by the plaintiff but sought to conserve the interests of the Company does not alter the principle controlling the situation.

For these reasons the giving of the instruction complained of was error. It was based on incompetent evidence; and was therefore not an admissible instruction.

> Latourette v. Meldrum, 90 Pac. 503;
> Dallas Consol. Elec. St. R. Co. v. English, 93 S. W. 1096;
> First Natl. Bank v. Brown, 116 N. W. 685.

Immediately following the Court tells the jury that the admission embodied in the resolution is not detracted from by reason of the fact that it was made after the services were performed, nor did that fact detract from it as an admission that *at the time the resolution was passed, the directors regarded the services as not gratuitous.*

And further tells the jury that while this admission did not bind the corporation, to compensate the plaintiff, yet at the same time they could consider it

> ''in determining what was the *understanding* of the Board of Directors as to whether the services were within or without the scope of Mr. Dunlap's duties as Secretary and Treasurer, or as Director and Vice-President.''

These instructions taken in conjunction are inconsistent for in the one case the jury is told they are to determine from the *testimony* what services were unofficial and what official. And in the next breath are told that they are to consider that vague, uncertain and shadowy thing, the *understanding* of the Board as to whether the services were within the official scope of the plaintiff or not.

The first statement properly expresses the law. The latter instruction should no more have been given than the resolution upon which it was based should have been allowed to go in evidence, and for the same reasons.

If we are right in our contention as to the law in this case, no understanding or admission involved in this resolution could have any weight or control in binding the corporation.

If the law be that the implied promise to pay and expectation of payment must exist on the part of both plaintiff and defendant *prior* to the rendition or *during* the rendition of services, how then can any resolution passed years after the services were rendered to the effect that these services were without the scope of the plaintiff's employment, and that the sense of the Board is that plaintiff should have some compensation therefor, be construed into an admission that the Board always understood and intended to pay for the services some time and accepted them upon that understanding?

For it could only be upon such a construction that this instruction to the jury can be sustained.

We submit that no such construction can be placed upon such resolution and the same cannot therefore be deemed an admission binding on the part of the defendant corporation as stated in the instruction.

See the case of

Metropolitan El. Ry. Co. v. Kneeland, 24 N. E. (N. Y.) 383,

where the directors of a railway company voted without authority to pay their president a salary and at a subsequent meeting assumed to authorize him to issue and negotiate the company's notes in payment thereof. Some of the notes passed into the hands of bona fide purchasers, and the company thereupon brought suit against its president and directors for the value of the notes issued.

The action was held maintainable against the directors who voted to confer the power, and the Court of Appeals say:

> "Those who voted for the resolution which in form authorized one of their number to issue and negotiate notes of the plaintiff, assumed to authorize, and, by authorizing, caused some of the notes in question to be issued and negotiated. They had no power, express or implied, to pass that resolution, or its predecessor which provided a salary for the president. They could not thus give away the property of the corporation. They could not bind the stockholders by voting to appropriate the assets of the company to an illegal purpose."

See also to the same effect the case of

Doe v. Northwestern Coal & Transportation Co., 78 Fed. 62,

hereinbefore cited.

We contend that the allowing of this resolution in evidence (Assignment X) and the giving of the instruction complained of, based thereon constitute reversible error.

For these reasons as well as for all of the errors assigned, we submit that the judgment of the lower Court should be reversed.

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